UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

PINNACLE FOODS GROUP, LLC, and its successor CONAGRA BRANDS, INC.	)	
Respondents,	)	
and	)	**Case No: 14-CA-226922**
	)	**14-CA-228742**
LOCAL 881 UNITED FOOD AND COMMERCIAL WORKERS	)	
Charging Party.	)	

RESPONDENTS' MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

COME NOW Respondents, Pinnacle Foods Group, LLC ("Pinnacle") and Conagra Brands, Inc. ("Conagra) (collectively "Respondents"), by and through their attorneys, and pursuant to Sections 102.20 and 102.21 of the Rules and Regulations of the National Labor Relations Board ("Board"), move the Board to dismiss the Amended Consolidated Complaint ("Complaint"). In the alternative, Respondents move for a more definite statement.

ARGUMENT

A. The Board Should Dismiss the Complaint Against Respondents.

1. The Claims Against Pinnacle Lack Evidentiary Support.

The Complaint alleges the following:

- That from March 7, 2018 through October 24, 2018, Pinnacle "failed and refused to bargain with the Union by not making itself available for bargaining on reasonable dates" (Complaint, ¶ 6(B);

- That from March 7, 2018 through October 24, 2018, Pinnacle "failed and refused to bargain with the Union by not providing sufficient time to bargain during bargaining sessions" (Complaint ¶ 6(C));
- That on September 17, 2018, Pinnacle "changed the shifts for Lines 4 and 5 from 12-hour shifts to 8-hour shifts and unilaterally implemented bidding procedures for these new shifts" without bargaining with the Union to impasse (Complaint, ¶¶ 7(A), 7(D).

These allegations, however, are wholly lacking in evidentiary support. Allegations raised by the Board in a complaint that are unsupported by the evidence lack merit and should be dismissed. *See D&F Electric, Inc. and Int'l Brotherhood of Electrical Workers, Local Union 369,* 1998 WL 1985024 (1998) (complaint dismissed because General Counsel's allegations lacked evidentiary support). In this case, there is no evidence that Respondents failed or refused to bargain with the Union, failed to provide sufficient time to bargain during bargaining sessions, or unilaterally implement terms and conditions of employment without bargaining with the Union.

There is no evidence that Pinnacle failed to bargain collectively or in good faith with the Union at any time. The Complaint is deliberately vague about the allegations regarding bargaining, contending that during a period of over seven months, Pinnacle did not make itself available for bargaining and did not provide sufficient time to bargain during bargaining sessions. In fact, Pinnacle was committed to the bargaining process when it commenced and did not fail to meet its responsibility by bargaining with the Union in good faith. Pinnacle was responsive and cooperative with the Union in establishing negotiation dates, and times for bargaining sessions. The Union never suggested additional bargaining dates and never objected that the bargaining sessions the parties did have were too short.

Additionally, Pinnacle had two representatives that consistently traveled between Parsippany, New Jersey and St. Elmo, Illinois for each of the sessions scheduled and completed in 2018. The Union at no time communicated any concern, desire to meet more frequently, or issue regarding the negotiation process or indicated in any way that Pinnacle was not bargaining in good faith prior to filing its charge. Furthermore, on July 12, 2018, Pinnacle informed the Union that it had agreed to be acquired by Conagra (the "Acquisition") and recommended that the parties pause negotiations until the anticipated completion of the deal in late 2018. The Union initially stated that it agreed with that position, but on July 19, 2018, the Union changed its position and requested that the parties continue the negotiations as planned despite the Acquisition. Pinnacle obliged and met with the Union in August as previously planned. After the negotiations concluded in August, a Union representative indicated that if Pinnacle was aware of any updates regarding the completion of the Acquisition, the Union would be open to adjusting any future planned negotiation dates given the fact that Conagra would be the controlling entity after the Acquisition.

Once an employer provides appropriate notice of bargaining to a union, the onus is on the Union to request bargaining over subjects of concern. *NLRB v. Island Typographers, Inc.,* 705 F.2d 44, 51 (2d Cir. 1983). If the Union fails to request bargaining, the Union will have waived its right to bargain over the matter in question. *Id.; Assoc. Milk Producers, Inc.,* 300 N.L.R.B. 561, 563 (1990). "[A] union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *Island Typographers,* 705 F.2d at 51. The filing of an unfair labor practice charge does not relieve the Union of its obligation to request bargaining. *Assoc. Milk Producers,* 300 N.L.R.B. at 564. ("[I]t [i]s incumbent on the Union to request bargaining—not merely to protest or file an unfair labor practice charge").

In this case, there is no evidence that the Union made requests for bargaining during the time period at issue, or that it requested bargaining on the issue of shift changes. The Union's failure to raise the issue does not constitute waiver of its right to bargain if the Union is led to believe that an attempt to bargain over the issue would be futile. *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1568 (10th Cir. 1993); *accord NLRB v. Nat'l Car Rental Sys., Inc.,* 672 F.2d 1182, 1189 (3rd Cir. 1982). In this case, however, there was no indication that Pinnacle would refuse to bargain. To the contrary, the record is clear that Pinnacle agreed to bargain and sent representatives to bargain during the relevant time period alleged in the Complaint. Consequently, the Complaint lacks evidentiary support and should be dismissed.

2. <u>Conagra Was Improperly Named as a Respondent in the Complaint</u>.

As noted in Pinnacle's prior filings with the Region, Conagra completed its acquisition of Pinnacle on October 26, 2018. The Complaint nevertheless names Conagra as a Respondent despite the fact that the alleged failure to bargain purportedly occurred before the Acquisition, from March 7, 2018 through October 24, 2018 and in September, 2018. (Complaint, ¶¶ 6, 7). The Region's efforts to include Conagra as a Respondent is an unnecessary exercise. Pinnacle has never made any effort to claim the Region or the Union named the incorrect respondent in the charge or Complaint. Pinnacle has proceeded throughout the Region's investigation under the premise that the identity of the respondent is proper.

Pursuant to the National Labor Relations Board's Compliance Manual, "In the event the investigation raises a question as to the identity of the charged party, the Board agent should immediately seek to obtain all information relevant to resolving the issue." § 10504.5. Such is exactly what the Region did in this case by inquiring of Pinnacle the nature of the relationship between the entities in question. In response, Pinnacle provided the Region with a complete and accurate description of the relationship.

The Compliance Manual also provides "Some of the Agency's most challenging investigations and litigation involve attempts by a respondent to avoid liability under the Act by creating new business entities, disguising ownership and/or selling its business operations. Prompt identification and investigation of these issues greatly enhance the likelihood that a satisfactory remedy will be obtained in what may otherwise prove to be an extremely problematic case." § 10504.8. In this case, however, there is no indication that the allegations raised in the Complaint would qualify as an "extremely problematic case." Further there is no indication whatsoever Pinnacle would not comply with a Settlement Agreement or order should one be issued, or attempt to avoid liability if the Board rules against it. The employer continues to produce products at its St. Elmo facility and there is no evidence it has any intention to reduce or cease operations.

The Compliance Manual further states "If the Region obtains evidence that the respondent will be unable to satisfy its compliance obligations, the Region should determine whether there is another party that should be alleged as derivatively liable for respondent's compliance obligations." § 10506.4. Again, there is no information presented or indication that Pinnacle will be unable to satisfy its compliance obligations in the event the claims asserted in the underlying complaint are found to have merit.

Finally, the Compliance Manual provides that an investigation may be appropriate under the following circumstances:

- claim of inability to pay or to comply raised by any party,
- closure of business or substantial part (e.g., layoff),
- sale or potential sale of all or part of business,
- potential or actual loss of significant portion of customer base (e.g., completion of a major contract),

- apparent loss of assets, lack of cooperation by the respondent in providing evidence of its ability to comply, or supporting its inability to comply, or bankruptcy.

§ 10508.4. Clearly, none of these situations applies to the instant situation. Respondents continue to produce the same products with the same employees at its St. Elmo facility. The investigation demonstrated that Conagra was not the employer until after the investigation.

The Complaint makes **no** allegations against Conagra, but nevertheless names it as a Respondent. There simply is no basis for naming Conagra as a Respondent when there are no claims against it and no evidence that Respondents will not comply with any orders of the Board. The addition of Conagra to the Complaint does nothing more than to further delay and complicate what, at one point, was a relatively straightforward case. Conagra should, therefore, be dismissed as a Respondent.

B. In the Alternative, the Region Should File a More Definite Statement of the Claims.

Should the Complaint be allowed to proceed, the Region should file a more definite statement of the claims against Pinnacle. With respect to bargaining, the Complaint alleges that "from about March 7, 2018 through October 24, 2018," Pinnacle "failed and refused to bargain" with the Union by "not making itself available for bargaining on reasonable dates," and by "not providing sufficient time to bargain during the bargaining sessions held." (Complaint, ¶¶ 6(B), (C)). The Complaint fails to identify any dates when the Union requested bargaining and Pinnacle refused, or any bargaining sessions that the Union asserted were too short within the seven-and-one-half-month time frame asserted in the Complaint. In addition, Pinnacle has repeatedly asked the Region for an estimate of the financial liability, if any, associated with the claims in the Complaint in order to facilitate settlement. The Region has steadfastly refused to provide any assessment, estimate, or detail in this regard

As noted above, Pinnacle met with the Union multiple times between March 7 and October 24, 2018. Without further information regarding the specific dates the Union contends Pinnacle refused to meet, or when bargaining sessions were shortened, Pinnacle will be unable to prepare adequately

for the hearing in this matter. Moreover, because the Region has refused to provide Pinnacle with any assessment of potential liability, Pinnacle's settlement efforts have been frustrated. Consequently, if the Complaint is not dismissed, the allegations in the Complaint regarding failure to bargain should be amended to provide Pinnacle with a more definite statement of the Region's claims so that Respondents may prepare their defenses in this matter and/or be able to assess in more realistic terms the nature of the allegations in order to facilitate settlement.

CONCLUSION

Wherefore, for these reasons, Respondents Pinnacle Foods Group, LLC and Conagra Brands, Inc., respectfully request that the Region dismiss the Complaint against both Respondents. In the alternative, Respondent request that the Region file a more definite statement of the claims against Respondents.

Respectfully submitted,

MCMAHON BERGER, P.C.

/s/ James N. Foster, Jr.
James N. Foster, Jr.
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350—Telephone
(314) 567-5968—Facsimile
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2019, a true and correct copy of the above document was filed via electronically on the Board's website with the following individuals:

Leonard J. Perez, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

I further certify that on the 11th day of March, 2019, a true and correct copy of the above document was served via United States first class mail, postage prepaid and email, upon:

Jonathan Karmel, Attorney
The Karmel Law Firm
221 N. LaSalle St., Suite 1550
Chicago, IL 60601-1224

Joseph C. Torres, Esq.
The Karmel Law Firm
221 N. LaSalle St., Suite 1550
Chicago, IL 60601-1224

Glen M. Taubman
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160

/s/ James N. Foster, Jr.